Supreme Court, U. S.
FILED
JAN 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-826

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

v.

CITY OF FAIRFAX, *et al.*,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

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January 9, 1978

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I. The decision offered for review is not final.

The decision which Petitioners seek to have this Court review is the Fourth Circuit's ruling that the grant of summary judgement by the District Court was in error, because of the existence in the record of genuine issues of material fact. If the very decision sought to be reviewed here had been rendered by the District Court, instead of the Fourth Circuit, it would not have been appealable at all, even to the Court of Appeals, because it lacks the necessary finality.

This case does not present such an extraordinary situation as has occasionally warranted the Supreme Court's review of a nonfinal order. Here the facts are in dispute.

Petitioners characterize the Fourth Circuit's opinion below as being in conflict with decisions of the Supreme Court and of other circuits with respect to the applicability of the Sherman Act (15 U. S. C. § § 1, 2, 3) to state and local public entities. But the decision of the Fourth Circuit was that this record contains genuine issues of material fact as to:

(a) How "public" these entities really were.
(Opinion below, Appendix to Petition at 7a-10a, 13a-15a, 18a)

(b) Even if "public" whether they, as local entities, possess sufficient "sovereign" characteristics to be compared to the entities involved in the cases which Petitioners cite. (Opinion below, Appendix to Petition 7a-10a, 13a-16a)

(c) Even if public and properly empowered by the state, whether they were *acting* in a public or sovereign capacity when they committed the acts complained of. (Opinion below, Appendix to Petition 7a-10a, 13a-16a)

II. All of the questions Petitioners seek to argue were presented and argued in *City of Lafayette, La. v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977)(Docket No. 76-864).

Since this case will be remanded for trial if *certiorari* is denied, this Court's decision in the Lafayette case, when announced, will provide adequate guidance for those proceedings in the District Court.

Therefore, the Petition For a Writ of *Certiorari* should be denied.

Respectfully submitted,

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January 9, 1978